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Choi Kok Kheong v Public Prosecutor

B HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL CASE NO BKI-42JSK S-1–1 OF 2024
LIM HOCK LENG J
28 NOVEMBER 2024

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether prosecution had failed to prove charge against appellant beyond reasonable doubt — Whether conviction was unsafe — Whether conviction and sentence had to be set aside and appellant acquitted and discharged*

D The appellant appealed against his conviction and sentence by the sessions court on a charge of committing a sexual offence against a girl aged seven years and ten months ('PW1') in the bedroom of a house in Penampang, Sabah on 27 June 2021. The offence, under s 14(a) of the Sexual Offences Against
E Children Act 2017, alleged that the appellant had inserted his finger into PW1's vagina. Following a full trial, the sessions court found the appellant, who was PW1's mother's 55-year-old boyfriend, guilty and sentenced him to six years' jail and to be whipped twice. In addition, he was ordered to undergo rehabilitative counselling whilst serving his sentence and to be under police
F supervision for three years after serving his sentence. The appellant's defence was that: (a) PW1 slept with her grandmother ('PW3') in a separate bedroom from her mother ('PW4') and therefore the offence could not have occurred in PW4's bedroom as alleged by the prosecution; and (b) PW4 ran a dog-breeding business and throughout the night of 27 June 2021 until the morning of the
G next day, the appellant was helping a dog deliver her puppies — a contention that PW4 denied. The trial judge accepted PW4's evidence, found that PW1's evidence corroborated medical evidence that she had had a tear in her hymen, found that PW1 had no motive to lie and that the weight of all the other evidence failed to support the appellant's contention that he was somewhere
H else at the time of the offence.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the accused:

I (1) It was clear that PW1 did not know the date when the appellant allegedly inserted his finger into her vagina. She said so at the trial. There was no eye-witness. PW3's and PW4's testimonies regarding the date when the alleged offence occurred must therefore be viewed with circumspection as their evidence was based on what PW1's sister (who was not called as a witness) had told PW3. The trial judge's finding of guilt was based on

PW3's testimony that the incident happened on 27 June 2021. If PW1 herself did not know the date, how could PW3 know the date? (see paras 48–51).

(2) Assuming PW3's and PW4's testimonies were true, the evidence that some members of the family were gambling in the living room when PW1 ran out of PW4's bedroom or that her underwear was found on the bedroom floor the next day did not mean that the charge against the appellant had been proven beyond reasonable doubt. PW1 herself did not testify that she had been violated by the appellant in the manner stated in the charge or that she had run out of the bedroom or that she had left her underwear on the bedroom floor on that particular night (see paras 55–56).

(3) The trial judge had admitted into evidence allegations of past sexual misconduct by the appellant against PW1 without first carrying out a balancing exercise to ascertain whether their probative value outweighed their prejudicial effect. By doing so, the judge commingled those alleged acts with the specific act set out in the charge. An accused was only required to answer to the specifics in the charge laid against him, for he might well have an explanation or defence in relation to acts which did not form part of the charge (see paras 65 & 77–78).

(4) The alleged CCTV recording which PW4 relied upon to give a date to the commission of the offence was not produced at the trial. Nor was it properly investigated by the investigating officer, PW5, as there was no evidence that he had even viewed the recording. Even if the CCTV recording was produced and it showed PW1 running out of PW4's bedroom on 27 June 2021 and her underwear was found on the floor of that room the next day, that did not mean the appellant had inserted his finger into PW1's vagina at the material time (see paras 69–70 & 72).

(5) There were fatal gaps in the prosecution's case that were not filled. In particular, evidence of the specific act on the date in question was found to be wanting and could not be linked to the specific date in the charge. The prosecution had candidly acknowledged at the appeal hearing that there was no evidence to show that the appellant had inserted his finger into PW1's vagina on 27 June 2021 either shortly before PW1 ran out of PW4's bedroom, or on the occasion when PW4 saw the appellant in an aroused state with PW1 and her sister in the same bedroom. The confluence of these factors meant that the conviction was unsafe (see paras 73 & 80–82).

[Bahasa Malaysia summary

Perayu telah merayu terhadap sabitan dan hukuman oleh mahkamah sesyen atas satu pertuduhan melakukan kesalahan seksual terhadap seorang kanak-kanak perempuan berumur 7 tahun 10 bulan ('PW1') di dalam bilik

tidur sebuah rumah di Penampang, Sabah pada 27 Jun 2021. Kesalahan tersebut, di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017, adalah bahawa perayu telah memasukkan jarinya ke dalam kemaluan PW1. Selepas perbicaraan penuh, mahkamah sesyen mendapati perayu, yang merupakan teman lelaki ibu PW1 ('PW4') berumur 55 tahun, bersalah dan menjatuhkan hukuman penjara selama enam tahun serta dua kali sebatan. Selain itu, perayu turut diarahkan untuk menjalani kaunseling pemulihan sepanjang tempoh hukuman penjara serta diletakkan di bawah pengawasan polis selama tiga tahun selepas tamat menjalani hukuman tersebut. Pembelaan perayu adalah bahawa: (a) PW1 tidur bersama neneknya ('PW3') di bilik tidur berasingan daripada ibunya ('PW4'), maka kesalahan tersebut tidak mungkin berlaku di bilik tidur PW4 seperti yang didakwa oleh pihak pendakwaan; (b) PW4 menjalankan perniagaan pembiakan anjing dan pada malam 27 Jun 2021 hingga pagi keesokan harinya, perayu mendakwa tertuduh membantu seekor anjing melahirkan anak — suatu dakwaan yang dinafikan oleh PW4. Hakim bicara menerima keterangan PW4, mendapati bahawa keterangan PW1 disokong oleh keterangan perubatan bahawa dia mengalami koyakan pada selaput dara, mendapati PW1 tiada motif untuk berbohong serta menilai bahawa keseluruhan keterangan lain gagal menyokong dakwaan perayu bahawa perayu berada di tempat lain pada masa kesalahan dilakukan.

Diputuskan, membenarkan rayuan, mengenepikan sabitan dan hukuman dan melepaskan dan membebaskan tertuduh:

(1) Adalah jelas bahawa PW1 tidak mengetahui tarikh apabila perayu didakwa memasukkan jarinya ke dalam kemaluannya. PW1 sendiri menyatakan demikian semasa perbicaraan. Juga, tiada saksi mata. Keterangan PW3 dan PW4 mengenai tarikh kejadian yang didakwa berlaku oleh itu hendaklah dilihat dengan penuh berhati-hati memandangkan keterangan mereka adalah berasaskan apa yang diberitahu oleh kakak PW1 (yang tidak dipanggil sebagai saksi) kepada PW3. Dapatan bersalah oleh hakim bicara adalah berasaskan keterangan PW3 bahawa insiden tersebut berlaku pada 27 Jun 2021. Jika PW1 sendiri tidak mengetahui tarikh tersebut, bagaimana pula PW3 boleh mengetahuinya? (lihat perenggan 48–51).

(2) Dengan andaian bahawa keterangan PW3 dan PW4 adalah benar, keterangan bahawa beberapa ahli keluarga sedang berjudi di ruang tamu ketika PW1 berlari keluar dari bilik tidur PW4 atau bahawa seluar dalamnya dijumpai di lantai bilik tidur pada keesokan harinya tidak bermaksud bahawa pertuduhan terhadap perayu telah dibuktikan melampaui keraguan munasabah. PW1 sendiri tidak memberi keterangan bahawa dia telah dicabul oleh perayu sebagaimana yang dinyatakan dalam pertuduhan atau telah berlari keluar dari bilik tidur atau telah meninggalkan seluar dalamnya di lantai bilik tidur pada

malam tersebut (lihat perenggan 55–56).

(3) Hakim bicara telah menerima masuk sebagai keterangan dakwaan salah laku seksual lampau oleh perayu terhadap PW1 tanpa terlebih dahulu membuat imbangan bagi memastikan sama ada nilai pembuktiannya mengatasi prejudisnya. Dengan berbuat demikian, hakim telah mencampuradukkan perbuatan yang didakwa itu dengan perbuatan khusus yang diperuntukkan dalam pertuduhan. Seorang tertuduh hanya dikehendaki menjawab terhadap butiran khusus dalam pertuduhan yang dikenakan ke atasnya, kerana dia mungkin mempunyai penjelasan atau pembelaan berhubung perbuatan yang tidak membentuk sebahagian daripada pertuduhan tersebut (lihat perenggan 65 & 77–78).

(4) Rakaman CCTV yang didakwa dan yang dirujuk oleh PW4 bagi memberikan tarikh kepada kejadian kesalahan tersebut tidak dikemukakan dalam perbicaraan. Ia juga tidak disiasat dengan sewajarnya oleh pegawai penyiasat, PW5, kerana tiada keterangan yang menunjukkan dia pernah menonton rakaman tersebut. Sekalipun rakaman CCTV itu dikemukakan dan menunjukkan PW1 berlari keluar dari bilik tidur PW4 pada 27 Jun 2021 serta seluar dalamnya ditemui di lantai bilik tersebut pada keesokan harinya, perkara itu tidaklah bermaksud bahawa perayu telah memasukkan jarinya ke dalam kemaluan PW1 pada masa yang material (lihat perenggan 69–70 & 72).

(5) Terdapat jurang yang bersifat fatal dalam kes pendakwaan yang besar. Khususnya, keterangan perbuatan tertentu pada tarikh yang dinyatakan didapati tidak mencukupi dan tidak dapat dikaitkan dengan tarikh khusus dalam pertuduhan. Pihak pendakwaan sendiri secara terbuka mengakui dalam pendengaran rayuan bahawa tiada keterangan yang menunjukkan perayu telah memasukkan jarinya ke dalam kemaluan PW1 pada 27 Jun 2021, sama ada sejurus sebelum PW1 berlari keluar dari bilik tidur PW4, atau pada ketika PW4 melihat perayu dalam keadaan terangsang bersama PW1 dan kakaknya di bilik tidur yang sama. Gabungan faktor-faktor ini membawa maksud bahawa sabitan tersebut adalah tidak selamat (lihat perenggan 73 & 80–82).]

Cases referred to

Amran Senin v Pendakwa Raya [2013] MLJU 1628, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)
Goh Han Heng v PP [2003] 4 SLR 374, HC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Mohan Singh a/l Lachman Singh v PP [2002] 3 MLJ 291, CA (refd)
Mohd Faiz bin Ismail v PP [2023] MLJU 2330; [2022] CLJU 3146, HC (refd)
Mohd Haniff Kassim v PP [2015] 3 CLJ 984, HC (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ

875; [2014] 7 CLJ 897, CA (refd)
Murugayah v PP [2004] 2 MLJ 545; [2004] 2 CLJ 489, CA (refd)
Pendakwa Raya v Wong Chee Beng [2016] MLJU 1227, HC (refd)
Rahmani Ali Mohamad v PP [2014] 6 MLJ 525; [2014] 7 CLJ 405, CA (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471; [2009] 6 CLJ 93, FC (refd)
Yahya Hussein Mohsen Abdulrab v Public Prosecutor [2021] 5 MLJ 811; [2021] 9 CLJ 414, FC (refd)

Legislation referred to

Criminal Procedure Code s 402A
Sexual Offences Against Children Act 2017 s 14(a)

Hamid Ismail (Hamid & Co) for the appellant.
Lovely Natasha Charles (Deputy Public Prosecutor, Sabah State Attorney-General's Chambers) for the respondent.

Lim Hock Leng J:

[1] In the charge framed under s 14(a) of the Sexual Offences Against Children Act 2017 ('the SOACA'), the appellant was alleged to have, on 27 June 2021, in the bedroom of an unnumbered house at Kampung Kompipinan Dabak, Penampang, 'memasukkan jari ke dalam kemaluan kanak-kanak berkenaan'.

[2] The charge reads as follows:

> Bahawa kamu, pada 27/06/2021, bertempat di bilik tidur sebuah rumah yang tidak bernombor, Kampung Kompipinan Dabak di dalam daerah Penampang, di dalam negeri Sabah telah melakukan amang seksual fizikal terhadap kanak-kanak dengan menyentuh mana-mana bahagian badan seorang kanak-kanak iaitu xxx (No Mykad: XXXXXX-XX-XXXX) berumur 7 tahun 10 bulan dengan memasukkan jari ke dalam kemaluan kanak-kanak, oleh yang demikian kamu telah melakukan kesalahan dibawah Seksyen 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (Akta 792) yang boleh dihukum di bawah Seksyen yang sama.

[3] After a full trial, the appellant was convicted of committing physical sexual assault on a child who was seven years and ten months of age ('PW1') at the time.

[4] The appellant, the 55-year-old boyfriend of PW1's mother, was sentenced to a term of imprisonment for six years, and ordered to be whipped twice. He was also ordered to be placed under police supervision for three years after serving sentence, and to undergo rehabilitative counselling while imprisoned.

[5] The prosecution called five witnesses to prove the essential elements of the charge:

(a) PW1 was a child;

(b) the identity of the accused;

(c) there must be physical sexual assault or contact on the child victim by the accused; and

(d) that assault or contact must have been carried out with a sexual purpose or intent.

[6] The five witnesses were:

(a) the alleged victim ('PW1');

(b) a doctor from the obstetrics and gynaecology unit at the Hospital Wanita dan Kanak-Kanak Likas ('PW2');

(c) PW1's grandmother ('PW3');

(d) PW1's mother ('PW4'); and

(e) the investigating officer ('PW5').

[7] PW1's MyKid was marked as exh P7, thus establishing her age at the time the offence was said to have been committed. Her age was not disputed.

[8] As for the accused's identity, he was identified by both PW1 and her mother PW4 at the trial.

[9] At the trial, the appellant was represented by a different counsel.

[10] Aggrieved by the outcome of the trial, the appellant appealed to this court.

NOTICE OF MOTION (FURTHER OR ADDITIONAL EVIDENCE, AND SUPPLEMENTARY PETITION OF APPEAL)

[11] For the purposes of the appeal, the appellant had engaged a different counsel who filed a notice of motion to adduce further or additional evidence, primarily on the basis of the previous counsel's flagrant incompetence.

[12] The appellant's application to adduce further or additional evidence was general and broad, as can be seen from the notice of motion and affidavit in support. It was, in substance, an attack on the previous counsel's flagrant incompetence.

[13] The application was disallowed, though the appellant was allowed to file a supplementary petition of appeal (to which the prosecution was amenable).

[14] The appellant felt aggrieved his previous counsel did not put across his case that: (a) from morning till about 3.30pm on 27 June 2021, he was at a training centre and he could not recall the time he had returned to PW4's house on that day; and (b) when he arrived at PW4's house on that day, he and PW4 were attending to their dog which was about to give birth. In his affidavit-in-support, he averred he was with PW4 from that night till the morning, and he was the one who had cut the umbilical cord.

[15] The appellant also took issue with his previous counsel's omission in objecting to other alleged acts of sexual misconduct on the victim on other dates which, it was argued, were prejudicial and inadmissible.

[16] The appellant averred/suggested he could not have committed the offence with which he was charged on account of that narrative, and that he had given instructions to his previous counsel to deny that he had inserted his finger into PW1's vagina which instructions were allegedly not followed.

[17] The appellant contended that the flagrant incompetence of his counsel violated his constitutional right to a fair trial, and rendered his conviction unsafe. See *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471; [2009] 6 CLJ 93 and *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811; [2021] 9 CLJ 414.

[18] The appellant wanted to adduce further or additional evidence of his instructions which are inconsistent with his witness statement, DWS1.

[19] The appellant's application/contention is unmeritorious. There were instructions from Choi to his counsel which emerged from time to time at the trial. For example, the appellant's erstwhile counsel mentioned his client's instructions that the victim slept in her grandmother's bedroom and not her mother's bedroom. See NOP, p 52, lines 10–11 and 30–32. As another example, see also NOP, p 71, lines 32–34, when the appellant's counsel prefaced a cross-examination question for PW4 with the words: 'According to my client, because he is more than twenty years older than you …'. He then proceeded to relate the appellant's version that the victim had always been sleeping with the grandmother PW3 while the victim's sister slept with their mother PW4. See NOP, p 72, lines 6–9.

[20] It is also obvious the appellant had told his counsel about PW4's dog breeding business, and the foundation was laid for the appellant's diary to be

adduced if his defence were to be called, with the object of showing he was elsewhere at the material time. See NOP, p 48. A

[21] There were other indications that the appellant's instructions were ventilated at the trial. For example, see NOP, p 74, as to PW4's jealousy and her installation of a device in the appellant's hand phone so she could monitor his whereabouts. B

[22] Bearing in mind the various occasions on which the appellant's instructions were mentioned or raised during the trial, I do not think it can be said the defence counsel did not carry out instructions and was flagrantly incompetent merely because he did not directly or expressly put it to the prosecution witnesses that he did not insert his finger into the victim's vagina. C

[23] Firstly, from a perusal of the NOP, it appears that the defence strategy was to rely on the contention that PW1 slept with her grandmother ('PW3') and not her mother ('PW4') who had separate bedrooms, and hence the act complained of in the charge could not have occurred in PW4's bedroom. D

[24] Secondly, the other part of the trial defence was to broach PW4's dog breeding business during the prosecution's case and then — if the defence were to be called — give evidence that he was with PW4 on the night in question, helping with the birth of the puppies. E

[25] In both instances, that was the defence's way of denying that the accused had inserted his finger in PW1's vagina on 27 June 2021. F

[26] Moreover, the defence was entitled to rely on the principle that the legal burden is always on the prosecution to prove its case, and not for an accused to prove his innocence. G

[27] Moving on, the appellant sought to disassociate himself from his witness statement by averring in his affidavit that after he had read the draft sent to him by WhatsApp, he had told his previous counsel he wanted to amend it but the latter 'told me I should just follow what he put inside the witness statement'. H

[28] The appellant's explanation is incredulous because he was asked at the trial if he had any amendments to be made before he signed the allegedly inconsistent witness statement which was to be tendered and marked as DWS1. He had answered in the negative. The appellant's averment that he had to answer 'no' because 'I remembered what my previous counsel's advice that I I

just need to follow what he put inside the witness statement' defies belief, as he had sworn to tell the truth.

[29] The alleged instructions are not capable of belief, and are not evidence which could not be adduced at the trial.

[30] The threshold for the adduction of additional evidence, as propounded in *Murugayah v Public Prosecutor* [2004] 2 MLJ 545; [2004] 2 CLJ 489, has not been met.

[31] In any event, the appellant did adduce evidence of where and what he was doing on the date in question, 27 June 2021, through the tendering of his diary which was marked as exh D1. The purpose of D1 was to show that the appellant could not have committed the alleged act of inserting his finger in PW1's vagina at the material time stated in the charge, since he was elsewhere. The omission to give notice of the alibi notice is not necessarily fatal. See s 402A of the Criminal Procedure Code.

[32] The learned SCJ noted that although the appellant said he was not at home on 27 June 2021 from 3.30pm till late evening, the appellant had confirmed that he had gone back to the house that night. While the appellant said he could not recall when he got back, and that he was with PW4 'at all times from 27th night to the 28th morning', attending to the birth of the puppies from midnight onwards, the learned SCJ accepted the evidence of PW4 who denied the appellant's narrative.

[33] The learned SCJ found the victim/PW1 to be a competent witness whose evidence was corroborated by medical witness from PW2 of a tear in the victim's hymen.

[34] She further found that the victim had no motive to lie, and the appellant had failed to adduce sufficient evidence of any motive on the part of PW1 to lie. See *Goh Han Heng v Public Prosecutor* [2003] 4 SLR 374, p 382, para 32, cited with approval in *Amran Senin v Pendakwa Raya* [2013] MLJU 1628.

[35] Notably, the learned SCJ did not treat the appellant's alibi as inadmissible but found it did not raise a reasonable doubt on account of the testimony of PW4 and the accused.

[36] The appellant could not be said to have been deprived of a fair trial through the alleged flagrant incompetence of his erstwhile counsel. He elected to give and did give evidence under oath, through his witness statement

DWS1, and had every opportunity to give further evidence about his alleged instructions under cross-examination and re-examination. The appellant also called DW2 and DW3 to testify on his behalf but to no avail.

APPEAL PROPER: EVIDENCE OF OTHER SEXUAL INCIDENTS AND INCOMPLETE/SHODDY INVESTIGATIONS

[37] The main issue raised at the appeal proper was whether the appellant had inserted his finger into PW1's vagina in her mother's bedroom on 27 June 2021, as per the charge.

[38] It was common ground that the appellant stayed at PW3's house as they were involved in a romantic relationship, albeit a tempestuous one. According to PW3, the appellant stayed there from June 2020 to 29 June 2021. According to the appellant, he stayed there from June 2020 and left for good on 1 July 2021, after a quarrel with PW4.

[39] PW3 usually occupied one bedroom with PW1. PW3 had a partner who occasionally stayed over the weekend. On those occasions, PW1 would shift to PW4's bedroom. Otherwise, PW4, her other daughter, and the appellant typically slept in that bedroom.

[40] There were various incidents of sexual acts that the appellant was said to have perpetrated on PW1.

[41] These alleged acts came to light on 12 July 2021.

[42] On that day, PW1's sister told their grandmother ('PW3') that her elder sister PW1 had a big secret, that the appellant had been using her. It was thus PW3 asked PW1 directly what had happened. PW1 told her that she had a bad life, and enquired whether the appellant was coming back.

[43] According to PW3, when told that the appellant would not be coming back: 'Dia ('PW1') menceritakan dia seringkali kena buat ada pernah satu kali si Choi insert dia punya kemaluan ke dalam kemaluan ('PW1') tetapi it was unfit dia bilang. So si Choi guna jari dia untuk cucuk dia punya kemaluan. Choi juga ada ajak ('PW1') tengok video lucah, And then si Choi suruh ('PW1') tengok video itu dan ikut apa video itu buat until ('PW1') bilang dia muntah. Choi suruh ('PW1') pegang dia punya kemaluan tapi ('PW1') tidak berdaya lalu si Choi buat sendiri sehingga ada macam susu keluar daripada kemaluan si Choi. Lalu dia buang di tandas ('PW1') cakap. Adakalanya, Choi suruh ('PW1') tengok si Choi waktu mandi and then si Choi angkat ('PW1') di atas sinki lalu dis jilat ('PW1') punya kemaluan. Ada satu hari, Choi suruh ('PW1') pergi ke rumah saya dan disana dia buat begitu juga dia suruh ('PW1')

hisap dia punya kemaluan. Ada banyak kali juga dia buat memasukkan jari dia ke dalam kemaluan ('PW1'). And then ('PW1') diberi amaran untuk tidak memberitahu sesiapa termasuklah mama dia. Itu sahaja'. PW3 told PW4 about these incidents that night.

[44] On 13 July 2021, the following morning, PW3 lodged a police report (exh P6) at the Penampang IPD about these incidents.

[45] It will be recalled that the offence was alleged to have been committed on 27 June 2021 specifically, although the time was not specified.

[46] Since the appellant left the house for good either in late June or on 1 July 2021, the incident would have happened in the first half of 2021. See NOP, pp 13–14. Either way, that is not good enough as the charge specifically stated the date of the offence as 27 June 2021, especially since there was a variety of acts that were alleged to have been committed by the appellant on PW1 on different, unknown dates.

[47] The appellant was only required to defend the specific offence against him said to have been committed on 21 June 2021.

[48] It is clear that PW1 did not know the date that the appellant inserted his finger in her vagina. She said so at the trial. There was no eyewitness.

[49] PW3 and PW4's testimony on the date that the offence was allegedly committed must therefore be viewed with circumspection, as their evidence was based on what PW1 had told her sister (who was not called as a witness) and what she told her grandmother PW3.

[50] As PW4 testified: 'Dia ceritakan kepada adik dia dan dia ceritakan kepada mama saya'. See NOP, p 58, lines 27–28.

[51] The learned SCJ's finding of guilt was based on PW3's testimony that the kejadian terakhir happened on 27 June 2021. Since PW1 did not know the date, how did PW3 know the date?

[52] This is what PW3 had to say: 'Pada malam hari itu, Choi dengan ('PW1') didalam bilik, kami sedang main judi dengan keluarga saya sendiri. Tiba-tiba ('PW1') keluar dari bilik berlari dengan pantas sehingga tidak memperdulikan kami panggil. Pada malam itu, mama dia pergi ke dalam bilik tengok si Choi didalam bilik. Dia sedang tengok handphone, Sekali anak saya buka selimut dia mendapati kemaluan si Choi berdiri. Keesokkan hari, mama dia terlihat seluar dalam ('PW1') di lantai. Itulah yang terakhir'. PW3 added

that PW1 ran out of her mother's bedroom.

[53] In respect of PW4's testimony, she said that after PW1 told PW3 about the 'kejadian-kejadian', she had asked PW1 as to what had happened. PW4 testified: '('PW1') tiada memberitahu bilakah tarikh berlaku tetapi saya ada bertanya dengan ('PW1') apa yang dia cari dalam bilik hari itu. Dia cuma bagitau tiada. Tapi keesokkan paginya, saya terjumpa seluar dalam ('PW1') dalam di lantai'.

[54] When giving further evidence-in-chief, PW4 said she remembered the date 27 June 2021 'sebab selepas dua minggu dari tarikh 27 Jun 2021, ('PW1') bertanya adakah Choi akan balik lagi jadi saya tengok rakaman CCTV pada 27 Jun 2021'. She explained that the CCTV recording showed: 'Pada masa itu kami sedang bermain judi di ruang tamu, pada masa itu saya ada masuk bilik juga dan buka selimut saya nampak kemaluan Choi sedang bangun masa itu dan ('PW1') disebelah dia. Jadi saya bertanya kenapa dengan kemaluan kamu dia jawab saya mahu kencing tapi selepas habis tengok phone dia dia baru mahu pergi'. She said that there were three of them in her bedroom, viz, the appellant, PW1 and her sister. See NOP, p 60.

[55] Assuming what PW3 and PW4 had to say is true, the strands of evidence that some members of the family were gambling in the living room, PW1 ran out of PW4's bedroom, or her underwear was on the floor the next day, do not mean that the alleged act of the appellant in inserting his finger in PW1's vagina on 27 June 2021 has been proved beyond reasonable doubt.

[56] In fact, PW1 (the only person with personal knowledge) did not give evidence that she had been violated by the appellant in that manner, or that she had run out of the room or left her underwear on the floor *on that particular night* following such an incident.

[57] The learned DPP argued that the date is not an ingredient of the charge. In support, she cited *Mohd Haniff Kassim v Public Prosecutor* [2015] 3 CLJ 984 where it was held by Choo Kah Sing JC (now JCA):

> A badly drafted charge deprives an accused of his fundamental right to raise or prepare his defence. This is more so when the exact time or date and place are essential ingredients of the offence charged. However, in cases where the time, date or place does not constitute an essential ingredient of the offence, mere non-compliance with s 153 of the CPC on the time, date or place will not vitiate the validity of the charge. As long as the general particulars of the time, date or place are stated in the charge and the exercise of an accused's fundamental right to defend his case is not prejudiced or derogated, the charge remains a valid charge.

[58] His Lordship went on to hold:

> The ingredients for the offence the accused was charged with in the instant case are: (a) there must be sexual intercourse between a man and a woman; penetration is sufficient to constitute sexual intercourse; and (b) that the victim is under the age of sixteen years of age when the alleged offence was committed. The exact time or date in the offence charged is not an essential ingredient in order to find conviction against the accused. However, it is to be noted that if the age of the victim at the time or date of the commission of the offence is in question, then it would be relevant to state the exact time or date of the offence was alleged to have committed.

[59] In that case, the respondent/accused was charged with raping the victim who was under 16 years of age between 20 to 28 June 2010, at between 2 to 4am. The victim was impregnated and went on to conceive.

[60] A DNA test established the respondent/accused's paternity.

[61] The respondent/accused denied having been to the place of incident and professed not to know the date on which he was said to have raped the victim. He also contended that the science officer was not a qualified person to prepare the DNA profiling report. Justice Choo found no merits in those arguments, and reversed the decision of the sessions court.

[62] The material facts in that case are markedly different. The act of sexual intercourse could hardly be denied. Here, the appellant's act of inserting his finger in PW1's vagina on 27 June 2021 was challenged, through the argument that PW1 stayed and slept in PW3's bedroom and could not have been in PW4's bedroom at the material time, more so as there was conflicting evidence as to the location or bedroom where the offence was committed. The appellant also took the position that he was helping PW4 with the birth of the puppies at the material time.

[63] On a related note, going by the charge, the point is that the appellant was not obliged to answer other allegations on another date. There was no 'on or about' or any other form of leeway in the charge allowed. He would be prejudiced if latitude were to be given to the precise date stated in the charge.

[64] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, the Federal Court considered the date of the offence of sodomy as an essential part of the charge. The majority held as follows:

> In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date. As has been pointed out, the Federal Court in the two cases referred to earlier

did not address its mind to the provision of s 153(1) of the Criminal Procedure Code. Perhaps that was because it was only dealing with the question whether the charges should have been amended. In the instant appeals we are dealing with the question whether, the offences not having been proved to have been committed on another date, it must be proved to have been committed on the date stated in the charges. Section 153(1) of the Criminal Procedure Code clearly states that 'The charge shall contain such particulars as to the time ...'. Since it is mandatory to state the 'time' (ie, date or period) when an offence is alleged to have been committed, clearly it is a 'material matter' and an 'essential part of the alleged offence', to use the words of Atkin J in the exception stated by him, even if that case is applied. If the law clearly provides that the charge shall contain particulars as to 'time', it follows that such particulars must be proved.

[65] Now, there were other allegations of sexual misconduct against the appellant which were made in relation to PW1. Although the evidence was not objected to, the learned SCJ did not carry out a balancing exercise to ascertain whether the probative value outweighed the prejudicial value. The omission is perhaps understandable as the evidence would go towards showing mens rea, that the act complained of was sexual in nature. Be that as it may, the balancing exercise which must be carried out, was not undertaken in the sessions court.

[66] In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217, the Supreme Court held:

On the principle laid down in *Makin*'s case 6 and *Boardman*'s case 12, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise be open to the accused (in addition to those under ss 14 and 15 of the Evidence Act 1950), it is admissible in evidence provided the probative value of such evidence outweighs its prejudicial value.

[67] On the back of this apex court authority, Collin Sequerah JC (now JCA), in *Pendakwa Raya v Wong Chee Beng* [2016] MLJU 1227, held:

Therefore it is clear that even in those cases falling under ss 11, 14 and 15 of the Evidence Act 1950, the test of relevancy is whether the probative value of such evidence outweighs its prejudicial value. *The court is thus not immunised from having to carry out a balancing exercise on this aspect*. This was made clear in the Court of Appeal case of *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334 which held:

A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss 14 and 15 of the Evidence Act 1950. The court would be justified in admitting the evidence where (its probative value is outweighed by its prejudicial effect). See, *Director of Public Prosecutions v Boardman* [1975] 3 AC 421; *Director of Public Prosecutions v P* [1991] 2 AC 447; *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 4 CLJ

201; *Public Prosecutor v Teo Ai Nee & Anor* [1995] 2 SLR 69; *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422; *Lee Kwang Peng v Public Prosecutor and another appeal* [1997] 3 SLR 278.

In *Tan Meng Jee v Public Prosecutor* [1996] 2 SLR 422, Yong Pung How CJ when delivering the judgment of the Singapore Court of Appeal said of the equipollent provisions in the Singapore Evidence Act:

> Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in *Boardman*'s case. Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused — based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence.

[68] In *Mohd Faiz bin Ismail v Public Prosecutor* [2023] MLJU 2330; [2022] CLJU 3146, Celestina Stuel Galid J went further and held that a statement by the magistrate in the grounds of judgment that 'the probative value of the evidence given as to the series of the accused's act outweigh the prejudicial effect against the accused because the accused was a teacher and was in the position of authority to pressurise PW3' was insufficient. It was held that the issue of admissibility should have been dealt with immediately, and not just in the grounds of judgment.

[69] On any view, the balancing exercise was not carried out by the sessions court in the present case; a fortiori, the prejudice accruing to the appellant here was stronger as the CCTV recording which PW4 relied upon to give a date to the commission of the offence was not properly investigated by PW5 as there was no evidence he had even viewed it.

[70] Further, the CCTV recording itself was not produced at the trial. Thus, even though PW5 had gathered statements from the other prosecution witnesses, obtained the; medical report (P4) and examination report (P5) from PW2, visited the scene of incident and made a sketch plan, and so on, PW5 did not investigate the alleged CCTV recording or secure a copy for the trial.

[71] The consequences have been made clear in *Rahmani Ali Mohamad v Public Prosecutor* [2014] 6 MLJ 525; [2014] 7 CLJ 405 where the Court of Appeal held:

> In our judgment, the appellant's right to a fair trial has been compromised as a result of the failure of PW8 to carry out investigation to verify the appellant's version of fact. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see: *Mraz v The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46; [2007] 4 CLJ 114).

[72] Even if the CCTV recording were produced and it showed PW1 running out of PW4's bedroom on 27 June 2021, and her underwear (which did not have any bloodstain) was found on the floor the next day, that does not mean the appellant had inserted his finger into her vagina at the material time.

[73] There are fatal gaps in the prosecution's case.

[74] It is a quantum leap to say that the appellant must have inserted his finger in PW1's vagina, only because PW3 says PW1 ran out of the room hastily on a particular night (the date of which was not proved) or that PW4 saw — in her bedroom — the appellant in an aroused state with PW1 and her sister, and PW4's underwear was found on the floor the next day. It could be any other act, sexual or otherwise in nature. It could be that the appellant was aroused at that time because he felt an urge to empty his bladder, as he explained to PW4.

[75] The outcome at the end of a criminal case depends not on the weakness of the defence, but on the ability of the prosecution to prove its case as set out in the charge beyond reasonable doubt. This court finds it necessary to hearken to *Mohan Singh a/l Lachman Singh v Public Prosecutor* [2002] 3 MLJ 291 where Gopal Sri Ram JCA (as he then was) held:

> The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16. That has always been the law. It is still the law.

CONCLUSION

[76] It is well-established that a court in an appellate capacity will be slow to disturb the decision of a trial judge. It will only do so when, as held by Zawawi Salleh JCA (as he then was) in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897:

(a) the judgment is based upon a wrong premise of fact or of law;

A

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

B

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

C

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned.

D

[77] The conviction is unsafe as the infirmities of the case fall squarely into those categories. The learned SCJ had allowed evidence of various acts committed on various dates to be commingled with the specific act set out in the charge, without carrying out the requisite balancing exercise of evaluating whether the evidence of similar and other acts of a sexual nature ought to be admitted by considering the probative value against the prejudicial aspects.

E

[78] An accused is only required to answer the specifics in the charge laid against him, for he may well have an explanation or defence in relation to acts which do not form part of the charge.

F

[79] There is also the incomplete investigation by PW5 which assumes greater significance, when one considers that PW3 and PW4's testimony originated from PW1 who did not know the date when the alleged offence was said to have been committed. That is not to say that PW1 was not telling the truth.

G

[80] Ultimately, there were gaps in the prosecution's case which were not filled. In particular, evidence of the specific act on the date in question was found to be wanting, and could not be linked to the specific date in the charge.

H

[81] At the hearing of the appeal on 27 November 2024, the court asked the prosecution/respondent whether it could identify any evidence to show that the appellant had engaged in the act of inserting his finger into PW1's vagina on 27 June 2021, shortly before: (a) PW1 ran out of PW4's bedroom, or (b) the occasion when PW4 saw the appellant in an aroused state with PW1 and her sister in the same bedroom — more so when the sister was not called as a witness. The learned DPP, with typical candour, acknowledged that there was no such evidence.

I

[82] The confluence of these factors meant that the conviction is unsafe. A

[83] For the reasons given, the appeal was allowed.

[84] The conviction and sentence were set aside. The appellant was acquitted and discharged. B

Appeal allowed; conviction and sentence set aside; and accused is acquitted and discharged.

Reported by Ashok Kumar C

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